**Wider Review of Scotland’s Statutory Debt Solutions**

**Stage 2 Working Group 2 – Protected Trust Deeds - Recommendations**

**March 2022**

# Contents

[1. Introduction 1](#_Toc100656811)

[2. Background 1](#_Toc100656812)

[3. The Committee’s Recommendations 1](#_Toc100656813)

[4. Protected Trust Deed Protocol 5](#_Toc100656814)

[5. Minimum debt level to enter a protected trust deed 9](#_Toc100656815)

[6. Prescribed rate of interest 24](#_Toc100656816)

[7. Improving information and understanding 26](#_Toc100656817)

[8. Free independent advice prior to signing a trust deed 30](#_Toc100656818)

[9. Implications of debtor’s death during a protected trust deed 34](#_Toc100656819)

[10. AiB protected trust deed audit activity 37](#_Toc100656820)

[11. Debtor discharge and refusal of discharge 39](#_Toc100656821)

[12. Group membership 46](#_Toc100656822)

[Annex A – Draft protected trust deed information leaflet 47](#_Toc100656823)

# 1. Introduction

1.1 Group 2 was established to focus on Protected Trust Deeds (“PTD”) – primarily the recommendations from the then Economy, Energy and Fair Work Committee (“the Committee”) Inquiry. However, the group was able to extend the scope of these discussions and explore other areas that may deliver improvements in the operation and delivery of PTDs.

# 2. Background

2.1 In January 2020, the Committee carried out a short, focused inquiry on PTDs. Following three evidence sessions with four different panels, held on 14, 21 and 28 January 2020, and submissions from all stakeholder groups, the [Committee published a report of their conclusions and recommendations](https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/5/21/Protected-Trust-Deeds#Executive-Summary) on 21 May 2020. The then Minister for Business, Fair Work and Skills provided an [initial response to the report](https://archive2021.parliament.scot/S5_EconomyJobsFairWork/Inquiries/20201016-SG-AiB-Response.pdf) on 15 October 2020.

2.2 In its report, the Committee made 14 recommendations aimed at enhancing the PTD process. These recommendations, outlined in paragraph 3 below, were used to frame the discussion of this group, although the scope for discussion was not limited by these specific issues.

# 3. The Committee’s Recommendations

| **Number** | **Committee recommendation** |
| --- | --- |
| 1. | The Committee welcomes the Scottish Government's commitment to conduct an overarching debt review. The urgent undertaking of this review remains the Committee's primary recommendation and the evidence and conclusions noted in this report should be seen within this context. The Committee expects this review to be undertaken during the current parliamentary session and would welcome confirmation on the timescales for this work. |
| 2. | The Committee firmly believes that when entering any debt solution, the debtor's payments should contribute to reducing their debt from the outset. The detriment to the debtor in a failed Protected Trust Deed is too severe and must be addressed. |
| 3. | The Committee recommends that the Accountant in Bankruptcy must be required to agree before a trustee can refuse to discharge a debtor in a Protected Trust Deed. The Accountant in Bankruptcy should develop clear criteria, based on fairness to the debtor, which would bring greater consistency in the discretion shown to clients who have experienced a change in circumstances. |
| 4. | The Committee notes that the Insolvency Practitioners Association already requires its members to only accept referrals from Financial Conduct Authority regulated lead generators. The Committee notes that the UK Government is expected to introduce a statutory regulation to ensure all insolvency practitioners abide by this practice - although no time scale has been set out. The Committee welcomes this development and recommends that the Scottish Government works with the UK Government to encourage its implementation. |
| 5. | The Committee also recommends that the Scottish Government works with the UK Government to extend Financial Conduct Authority regulation to include "effecting introductions to debt advice." This would require all lead generators to become regulated to operate legally. |
| 6. | The Committee does not doubt that insolvency practitioners follow the statements of insolvency practice and that Protected Trust Deed paperwork includes the necessary information for people in debt to make informed choices. However, the Committee is also convinced by the argument that the offering of free independent money advice is of benefit in bankruptcy and Debt Arrangement Scheme cases and, if applied to Protected Trust Deed cases, would go some way towards addressing the concerns of witnesses during this inquiry. |
| 7. | Witnesses highlighted the importance of debtor choice and, if the debtor is to have choice, they must be fully informed of all of their options. It is also vital that the debtor understands these options. It is far from clear that this is happening in many cases. |
| 8. | The Committee notes the significant increase in funding that would be required if all people experiencing problem debt were to seek independent free money advice before entering any of the three statutory debt solutions. However, it asks the Scottish Government to consider how access to free sector money advisers could be encouraged and built into the process before a debtor signs a Protected Trust Deed. The Committee recommends that different funding options should be explored to enhance the capacity of the free money advice sector, including the use of a levy on money paid through statutory debt options. |
| 9. | The Committee notes evidence from the Inverclyde focus group, where participants suggested that information about the benefits and risks of different statutory debt solutions should be given to everyone thinking about entering a Protected Trust Deed. The Committee agrees that a Scottish Government information leaflet which is presented in easily accessible language (in both print and digital formats) and signposts debtors to independent money advisers would be beneficial. The Committee recommends that trustees are required to issue this information leaflet to debtors before signing a Protected Trust Deed. The Committee also recommends that a cooling off period is put in place between receiving the leaflet and signing a Protected Trust Deed, to give debtors time to digest its contents. This would serve a different purpose from the current Debt Advice and Information Package. |
| 10. | The Committee understands that creditors and debtors can refer cases to the Accountant in Bankruptcy for audit where there are concerns about the fees charged. However, there is a cost attached to this, which may deter action. The Committee therefore recommends that the Accountant in Bankruptcy increases the number of self-initiated audits it carries out in order to monitor and discourage potential poor practice. The Accountant in Bankruptcy should also publish information about any trends it identifies so that insolvency practitioners, creditors and debtors can make themselves aware of any concerns. |
| 11. | As previously noted, the Committee firmly believes that when entering any debt solution, the debtor's payments should contribute to reducing their debt from the outset. The front-loading of fees means that debtors can pay instalments for over two years without paying off any of their debt. Whilst unproblematic in a successful Protected Trust Deed, the detriment to the debtor in a failed Protected Trust Deed is too severe. The Committee recommends that a staged fee payment structure is developed whereby a proportion of each payment goes to the creditors. |
| 12. | The Committee recommends that the minimum debt level to enter a Protected Trust Deed is increased to ensure there is more surplus income to repay the debt to creditors. However, Members are conscious that this may force more debtors into bankruptcy. The Committee therefore reiterates the importance of looking at the interaction between all statutory debt solutions via a general debt review. Appropriate options should be available for those who can no longer access a Protected Trust Deed. The Committee recommends that the need for an additional debt solution product should also be considered within the Scottish Government's debt review. |
| 13. | Committee members were concerned about the impact on family members of death during a Protected Trust Deed. On the one hand, it seems unfair that creditors who have agreed to be repaid via a Protected Trust Deed should get a windfall as a result of a death. On the other, it is recognised that the current legal framework requires debts to be settled before beneficiaries are entitled to receive anything from a deceased person’s estate. The Committee recommends that the Scottish Government looks at whether Protected Trust Deed arrangements strike the appropriate balance in this area as part of its general debt review. |
| 14. | Both the consequence of a death on a Protected Trust Deed and the consequences of early settlement are impacted by the statutory interest rate. The Committee believes that the approach of using the longstanding 8% statutory interest level is not appropriate for insolvency cases as it is too high. This should be reviewed in relation to insolvency. |

# 4. Protected Trust Deed Protocol

4.1 Accountant in Bankruptcy (“AiB”) has been working with stakeholders, via the [PTD Standing Committee](https://www.aib.gov.uk/protected-trust-deed-standing-committee) to review the recommendations raised by the Committee and to investigate if some of the areas can be addressed operationally and voluntarily in the immediate term, rather than by legislative provision. The PTD Standing Committee agreed:

* the interim dividend process for trustees where a debtor’s contribution should contribute to the reduction of their debt from the outset of the PTD and should commence earlier than the 24 months set out in the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”)
* that AiB should agree before a trustee can refuse a debtor’s discharge
* that trustees only accept referrals from the Financial Conduct Authority (“FCA”) approved lead generators

4.2 A sub group of the PTD Standing Committee was established - the PTD Protocol Working Group - to consider how these points could be adopted operationally in support of the Committee recommendations.

4.3 The PTD Protocol Working Group and stakeholders developed a voluntary protocol document which sets out the agreed changes to operational processes. The protocol promotes good practice, improves transparency in the PTD process and will provide meaningful data for AiB in relation to PTD dividends and failure rates.

4.4 The protocol has now been adopted by a number of Insolvency Practitioners (“IP”), such that 75-80% of future PTDs will be offered by protocol-compliant trustees. This means the majority of trustees are committed to considering earlier payment of dividends to creditors, and enhanced protection for those individuals that have granted a trust deed, in terms of referral to the IP and discharge from the process.

## Changes introduced by the protocol

### Interim dividend process for Trustees

4.5 Current legislation Section 176 of the 2016 Act provides that a trustee must pay a dividend to creditors no later than 24 months from the date the PTD is granted and every six months thereafter, and where the trustee has sufficient funds available to pay a dividend of at least 5p in the £. The legislation does not preclude a trustee from paying a dividend to creditors at an earlier stage.

4.6 The protocol requires that, wherever practicable, a dividend should be paid to creditors at month 12 and quarterly thereafter.

### Process for a trustee refusing debtor discharge

4.7 The protocol seeks to improve the protections available to debtors where consideration is being given to refusing their discharge through failure to meet the obligations of the PTD. The Committee recommendation called for a process that would require AiB to agree to the refusal of debtor discharge and clearer criteria which would allow greater consistency and transparency in reaching these decisions.

4.8 The protocol provides that where a trustee intends to issue a debtor notification under Section 184(8) of the 2016 Act, before issuing the notice, the trustee must first submit to AiB the “*Refusal of Debtor Discharge*” document and in advance of any Form 6 applications to AiB, irrespective of the legislation in effect at the date on which the Trust Deed was granted. The trustee is therefore required to articulate the reasons for their decision to refuse discharge in an agreed format for AiB to consider.

4.9 Should AiB disagree with the trustee’s proposed decision, the trustee will be contacted in the first instance to discuss matters. Where the trustee and AiB do not agree, AiB may issue a direction to the trustee in terms of existing legislative provisions which could be subject to challenge.

4.10 The protocol preserves the debtor’s right to seek a direction from a sheriff if they do not agree with the intention to withhold their discharge.

### Trustees to only accept referrals from FCA approved lead generators

4.11 Regulatory best practice covering the period leading up to the appointment of a trustee is set out in accordance with the Recognised Professional Bodies (“RPB”) guidance, Statement of Insolvency Practice (“SIP”) 3.3. The initial contact with a debtor is a significant part of the process and the Committee has recognised the importance of obtaining clear and impartial advice at this stage.

4.12 Specifically to address concerns regarding commercial arrangements some trustees have with lead generating organisations, the protocol endorses the RPBs’ Code of Ethics. The trustee must consider the professional or regulatory status of any introductory firm.

4.13 For the purposes of the protocol, a non-commercial organisation such as Citizens Advice Bureaux or local authority money advice unit is not considered a lead generator.

### Discussions

4.14 The group considered whether any of the protocol’s provisions should be adopted formally in legislation.

4.15 The consensus among members was that it would take time to establish whether the protocol was working effectively and that the requirement for legislative reform should be re-considered after a reasonable period of the protocol’s operation.

4.16 Group members highlighted the regulatory work being undertaken by the Insolvency Service, FCA and the RPBs to ensure that any third party lead generator and/or debt packager referring leads to the IP should be FCA authorised.

4.17 At the time of discussion, it was considered prudent to fully assess the impact of these regulatory reforms before taking forward legislative change. Since the Committee’s deliberations in this area, on 17 November 2021 the FCA published a consultation on amending their rules to ban ‘Debt Packagers’ from receiving ‘referral fees’ from debt solution providers. (Debt Packagers are defined by the FCA as *“authorised, commercial firms that provide debt advice services but do not provide debt solutions themselves. The business model relies on generating income from referral fees by passing customers onto certain debt solution providers.*”) The FCA states *“Our proposals aim to reduce the risk that consumers receive non-compliant debt advice that is biased towards debt solutions which may not meet their needs but generate referral fees for the debt advice firm.”* The Consultation closed on 22 December 2021.

### Recommendation

* **Recommendation 1** - The group agreed that the protocol’s processes address substantively the Committee’s recommendations 2, 3, 4, 5 and 11 in the table at paragraph 3 above. Although the new protocol may not address in entirety these specific Committee recommendations, the group agreed that the protocol should be allowed to operate for a reasonable period to gauge its effectiveness. Consequently, the members of the group agreed that these specific recommendations need not be reviewed in detail at the present time.

# 5. Minimum debt level to enter a protected trust deed

## Introduction

5.1 The group discussed the recommendation from the Committee PTD Inquiry concerning increasing the minimum debt level to enter a PTD and consideration of an additional debt solution (recommendation number 12 in the table in paragraph 3 above).

*“The Committee recommends that the minimum debt level to enter a Protected Trust Deed is increased to ensure there is more surplus income to repay the debt to creditors. However, Members are conscious that this may force more debtors into bankruptcy. The Committee therefore reiterates the importance of looking at the interaction between all statutory debt solutions via a general debt review. Appropriate options should be available for those who can no longer access a Protected Trust Deed. The Committee recommends that the need for an additional debt solution product should also be considered within the Scottish Government's debt review.”*

## Background

5.2 The Protected Trust Deed (Scotland) Regulations 2013 (“the 2013 Regulations”) introduced a £5,000 minimum debt level as a pre-qualifying condition of protection. Prior to this, a debtor with any level of debt could seek to enter a PTD with view to it becoming protected, there was no limit applied to the level of debt.

5.3 A 2016 consultation sought feedback on the changes implemented by the 2013 reforms and included a specific question on whether £5,000 remained an appropriate minimum debt level. Of the 26 responses received on this question, 73% of respondents stated that £5,000 was an appropriate debt level. Others argued the level should be increased to between £7,500 and £10,000.

5.4 In 2019, a further consultation sought views on proposals to address concerns raised about the PTD process (some of which were raised in the earlier consultation and in further feedback from stakeholders). This consultation again asked if the minimum debt level should be increased and of the 91 responses received, this time 63.7% thought that the level should be increased. Suggestions at this time ranged from £7,500 to £25,000, with around 42% of those responding in favour, recommending an increase to £7,500.

5.5 The issue was re-visited by the Committee. The Committee heard from organisations highlighting concerns with the balance between the debt levels and fees charged in PTDs where those with lower levels of debt had fees constituting a larger percentage of total debt. It also reported that statistics from AiB showed a considerable number of PTDs were for relatively low debt levels (under £7,500). As a result, the Committee included an increase to the minimum debt level in PTDs amongst their full recommendations.

5.6 However, their report also recognised that some witnesses had concerns that increasing the minimum debt level would reduce the flexibility of PTDs and force some individuals into bankruptcy. The recommendation to increase the minimum debt level was therefore caveated so that any change should be looked at as part of a general review of available procedures at Stage 3 of the Wider Review to ensure there was no corresponding detriment to the general public seeking help with problem debt.

## Recent Developments

5.7 The Debt Arrangement Scheme (“DAS”) reforms introduced in late 2019 made some significant changes to the operation of the scheme. The aim was to enhance the scheme and make it more accessible and sustainable and help ensure those who need it have access to the best debt management product to meet their needs, by encouraging more organisations to offer DAS as a solution. At the time of the Committee’s Inquiry, these changes had only just been introduced.

5.8 Since then, these reforms have translated into operational practice. While analysis of statistics collated during the period following the onset of the Coronavirus pandemic should be treated with caution, there is certainly some evidence of impact in relation to the activity levels for both DAS and PTDs.

5.9 AiB’s 2020/21 annual statistics show a decrease of PTDs registered (39.8%) and advertised (46.7%) from the previous year (2019/20). During the same period there has been an increase in DAS volumes (17.5%). Indeed, the activity levels for DAS do appear to be set in contrast to those for all insolvency solutions. However, in terms of total activity, DAS volumes still remain lower than PTDs – 3,677 as compared to 5,263 respectively for the periods in question.

5.10 Recent figures record the advice/IP organisations involved in new DAS proposals approved and PTDs granted for the first six months of 2021. When seen in contrast to the DAS activity figures for the calendar year 2019, it is evident that there has been a significant increase in private sector DAS provider cases. As an example, Carrington Dean’s DAS activity for the first six months of 2021 is approximately double that seen in the entire calendar year of 2019.

**Table 1: 1 Jan – 30 June 2021 – PTDs by Organisation**

| **Trustee organisation** | **Number of protected trust deeds** |
| --- | --- |
| **Total number of protected trust deeds** | **2,412** |
| of which organisation: Carrington Dean | 981 |
| of which organisation: Harper McDermott | 740 |
| of which organisation: Wilson Andrews | 193 |
| of which organisation: Interpath Advisory | 134 |
| of which organisation: J3 Debt Solutions | 125 |
| of which organisation: Wylie & Bisset | 84 |
| of which organisation: AGT Insolvency | 51 |
| of which organisation: Other | 104 |

**Table 2: 1 Jan – 30 June 2021 – DAS Debt Payment Programmes (“DPP”) by Organisation**

| **Money adviser organisation** | **Number of approved DPPs** |
| --- | --- |
| **Total number of approved DPPs** | **2,254** |
| of which organisation: Carrington Dean Group | 1,208 |
| of which organisation: Harper McDermott | 345 |
| of which organisation: StepChange Debt Charity Scotland | 255 |
| of which organisation: J3 Debt Solutions | 149 |
| of which organisation: Interpath Advisory | 56 |
| of which organisation: Begbies Traynor Central | 36 |
| of which organisation: Gregory Pennington (Wilson Andrews) | 35 |
| of which organisation: Other | 170 |

**Table 3: Calendar Year 2019 – DAS DPPs by Organisation**

| **Money adviser organisation** | **Number of approved DPPs** |
| --- | --- |
| **Total DPPs under the DAS approved** | **2,907** |
| of which organisation: StepChange Debt Charity Scotland | 1,080 |
| of which organisation: Carrington Dean Group | 606 |
| of which organisation: KPMG | 173 |
| of which organisation: Harper McDermott | 144 |
| of which organisation: Gregory Pennington (Wilson Andrews) | 116 |
| of which organisation: Citizens Advice & Rights Fife | 74 |
| of which organisation: North Lanarkshire Council | 68 |
| of which organisation: Campbell Dallas  | 66 |
| of which organisation: South Lanarkshire Council - Money Matters Advice Service | 61 |
| of which organisation: Murray Stewart Fraser  | 59 |
| of which organisation: The Moray Council | 53 |
| of which organisation: Begbies Traynor Central | 35 |
| of which organisation: Hamilton CAB | 31 |
| of which organisation: Perth CAB | 28 |
| of which organisation: Other | 313 |

5.11 There have also been developments in the area of debt advice and marketing. In February 2021, the Insolvency Service published [new guidance for IPs on advertisements, marketing and debt advice](https://www.gov.uk/government/publications/guidance-on-monitoring-insolvency-practitioners-advertisements-marketing-and-debt-advice/guidance-on-monitoring-insolvency-practitioners-advertisements-marketing-and-debt-advice). There has also been increased focus from the RPBs on the requirement for IPs and firms to only accept referrals from FCA authorised advice providers. In November 2021, the FCA released its consultation on Debt Packagers, with a view to reducing the risk that consumers receive non-compliant debt advice that is biased towards debt solutions which may not meet their needs but generate referral fees for the debt advice firm.

## Discussions

5.12 The group agreed to discuss the Committee recommendation to increase the minimum debt level in a PTD taking into account the latest evidence available and the views of each of the stakeholder groups represented.

5.13 In doing so, the group recognised that the minimum debt level in PTDs has been contentious since its introduction and has featured in two separate consultations aimed at identifying appropriate reforms that could address some principal concerns expressed. These can be summarised as follows:

* the creditor returns in lower debt level PTDs are more significantly impacted by the level of administrative costs applied
* the contributions typically paid in lower debt level PTDs and the resultant total payments during the PTD raised questions as to whether a PTD was the appropriate solution from both the debtor and creditor perspectives

5.14 The issues here are complex as moves to intervene on minimum debt level and access to PTDs as a means of debt resolution impinge on other areas, such as individual choice and the basic position that trust deeds are voluntary in nature with legislative provision in place for voting and protection.

5.15 The working group discussions have focussed on these issues and consideration was given to the wider implications and an impact assessment on several options. The group deliberations have also been informed by new and updated statistical reporting on PTDs and some of the developments that have taken place since the original consultations and the Committee Inquiry.

## Key Discussion Points

5.16 The group’s discussions covered general points about the minimum debt level and wide ranging and opposing issues associated with its increase:

* minimum debt level could be increased to either £6,000 or £7,500
* low debt level PTDs generally involve a high proportion of administrative cost when compared to the overall debt level due to the fixed fee element of the fee being broadly the same in all cases. This means that in low level/low debt cases, returns to creditors are proportionately lower since the costs are proportionately higher. In some historic circumstances the contributions paid have nearly matched the level of debt involved (if costs are ignored)
* increasing the minimum debt level may lead to individuals with lower debts opting for DAS – avoiding insolvency and generally leading to a favourable return for creditors.
* increase in minimum debt level may help steer individuals who can or cannot pay their debt into a more appropriate solution - even if numbers involved are relatively low - in line with an underpinning Scottish Government policy that those who can repay their debt should do so
* debt repayment solutions assist in financial rehabilitation and are therefore beneficial
* increasing the minimum debt level could disproportionally affect people on low incomes and exclude those in need from being able to access PTDs. In a number of low-contribution, low debt cases, the only alternative may be sequestration
* a higher qualifying debt level may remove freedom of choice – limiting solutions for debt relief for some of the most vulnerable
* unintended consequence of increased minimum debt level would likely see more people going into sequestration rather than DAS which will bring an even lower return for creditors
* changes in the PTD and DAS landscape since the Committee Inquiry (through DAS legislative reform) have made some inroads to addressing concerns over PTDs
* statistics considered by the group show that only a small and decreasing number of cases over recent years would have been affected by any increase in minimum debt level - one of the volume provider organisations highlighted that increasing the minimum debt level to £7,500 would have affected 10.98% of their caseload in 2018/19 and 6.27% in 2020/21

## Further consideration of protection criteria

5.17 Presently a trust deed will not be protected if payments ingathered from contributions over a 48 month period, taking into account any assets of the debtor, will equal or exceed the total debt. In addition to considering the implications of increasing the minimum PTD debt level, the group therefore considered the option of increasing the time period requirement that would see protection refused if the contributions could repay the full debt within the specific payment period. This increased time period would be used for protection criteria only, and would not impact on the 48 month minimum period of contributions.

5.18 The following points were made in this regard:

* suggestion that the current 48 month time period could be increased to 54 or 60 months – some IP firms already apply this measure in practice, with DAS the recommended best solution if total debt could be repaid within these timeframes
* creditor sector representatives were generally in favour of this option, as it addressed their concerns that consumers who could repay their debt were entering inappropriate solutions
* creditor representatives were generally in favour of a dual recommendation including an increase to the minimum debt level with an associated increase in the repayment period
* representatives from the IP sector found the option of increasing the repayment period in isolation preferable to an increase in the minimum debt level
* concerns remain that changes to the minimum debt level would impact on a small and decreasing percentage of cases and that limiting access to a debt solution would be potentially detrimental for those seeking help
* the more criteria around entry to a solution, the harder it is to access and therefore debtor choice is impacted
* alternatively, debtors should be channelled into a pre-determined outcome, based on their circumstances and choice should be discouraged
* one volume provider organisation highlighted that changing the minimum period of contribution from 48 to 60 months would have affected 8.87% of its case load in 2018/19 and 3.95% in 2020/21

## Supporting information considered by the group

5.19 To support discussions the group requested statistics covering the past 3 years, as follows:

* the number of PTDs by total debt level and time to repay debt in full (assuming no interest and charges/DAS equivalent) analysed by year (updated from the previous PTD consultation)
* PTDs concluded in that period analysed by debt bandings including the average dividends paid
* DAS cases approved and cases revoked in the same period including the numbers within each of the debt level bandings

**Table 4: PTDs – Analysis of Debt Level and Repayment Period based on contribution**

| **Financial year of protection date** | **2018-19** | **2019-20** | **2020-21** | **Total**  |
| --- | --- | --- | --- | --- |
| No. Total PTDs Protected | 7915 | 8742 | 5263 | 21920 |
| No. (%) with total debts under £6k | 185 (2.3%) | 174 (1.9%) | 33 (0.6%) | 392 (1.8%) |
| No. (%) with total debts under £7.5k | 869 (10.9%) | 830 (9.5%) | 330 (6.3%) | 2029 (9.2%) |
| No. (%) with total debts under £10k | 2087 (26.4%) | 2077 (23.7%) | 1004 (19.1%) | 5168 (23.6%) |
| No.(%) where debt paid could have been repaid in full in 54 months/4.5 years | 189 (2.4%) | 59 (0.7%) | 30 (0.6%) | 278 (1.3%) |
| No.(%) where debt paid could have been repaid in full in 60 months/5 years | 702 (8.9%) | 517 (5.9%) | 208 (3.9%) | 1427 (6.5%) |
| No.(%) where debt paid could have been repaid in full in 72 months/6 years | 1970 (24.9%) | 1752 (20%) | 907 (17.2%) | 4629 (21.1%) |

**Table 5: DAS – Cases by Debt Level and Repayment Period (2018/19 – 2020/21)**

| **Financial year 2018-19 – 2020-21** | **Total** | **No.(%) with total debts under £6k** | **No.(%) with total debts under £7k** | **No.(%) with total debts under £10k** | **No.(%) where debt can be repaid in 60 months/5 years** | **No.(%) where debt can be repaid in 72 months/6 years** |
| --- | --- | --- | --- | --- | --- | --- |
| DAS DPPs approved | 9349 | 1516 (16.2%) | 1916 (20.5%) | 3051 (32.6%) | 3304 (35.3%) | 4446 (47.6%) |
| DAS DPPs revoked  | 2540 | 482 (18.9%) | 628 (24.7%) | 964 (37.9%) | 742 (29.2%) | 1011 (39.8%) |

Table 5 is a combination of tables which can be found in [Ad-hoc statistical release ID 6](https://www.aib.gov.uk/ad-hoc-statistical-release-id6-supplementary).

5.20 While there are sharply opposing views on the issue of minimum debt levels in PTDs, including any further action to impose greater restrictions on protection where contributions can pay the debt over a prescribed period, there is broad recognition from the analysis of recent statistics that progress is being made on a number of the concerns that have existed in relation to the operation of PTDs. In particular:

* the proportion of total PTDs with debt levels of less than £6,000, £7,500 and £10,000 show a decreasing trend in each of the years subsequent to 2018/2019
* the proportion of total PTDs where the contributions can pay the total debt in 54, 60 and 72 months show a decreasing trend in each of the years subsequent to 2018/19
* DAS activity levels have increased since the 2019 reforms – in contrast to the trends seen for other insolvency solutions – although in overall numbers are still fewer than PTDs
* there has been a marked shift in the private sector IP firms bringing clients into DAS

5.21 The subject of the minimal debt level in PTDs was discussed at every meeting of the group. The group membership is drawn from the volume provider and insolvency profession, advice sector and creditor representatives and a wide range of views and experience were shared. Ultimately, consensus on this issue could not be reached and the group agreed to present their discussions, the statistics that they relied upon, and the potential outcomes.

## The case for the status quo - retaining the £5,000 minimum debt level in PTDs

5.22 The arguments for retention of the existing £5,000 limit were generally set out by the four PTD providers included in this group. The PTD providers in the group act in approximately 83% of all PTDs in force as at 30 September 2021.

* The most recent changes to the DAS legislation were implemented in November 2019, shortly before the Coronavirus pandemic, and they have resulted in an increase in the number of individuals accessing DAS as a remedy for their problem debts. It is our opinion that these changes are having, and will continue to have, the desired effect of increasing DAS numbers, whilst reducing the number of ‘low’ debt level PTDs. Furthermore, we believe that more time is required to assess the full effect of the DAS changes before further legislative change to low level PTDs is considered, so as to avoid rushed decision making and unintended consequences.
* The statistics, provided by the AiB, show that there has already been a significant increase in individuals entering into DAS and that the increase has been driven by the private sector. This is shown in Table 2 where six out of the seven largest DAS providers in the first six months of 2021 were from the private sector. If these trends continue in 2021 and into 2022, then the number of ‘low’ debt PTDs will diminish significantly.
* It is our opinion that it is inappropriate to rely on previous consultations on this matter because these were carried out before the new DAS legislation took effect and pre the Coronavirus pandemic. The previous consultation results do not reflect the current economic challenges. The questions in the previous consultations may now be answered differently by stakeholders because of the effects of the new DAS legislation and the present economic climate.
* We believe that for such a change to take place there should be consensus and evidence presented to substantiate the need for change. In our group there is no consensus, and no evidence has been presented that shows a change is required. If anything, the evidence points towards a change having taken place already, as stated in the first two bullets above.

5.23 In general, our view is that we should be helping individuals in Scotland access available debt solutions, not creating additional barriers to entry that restrict an individual’s choice of debt solution. A change in this area will mean individuals are forced to pay for longer in DAS or forced to apply for sequestration. Note too that if the sequestration contribution period were to be reinstated to three years, then individuals are very likely to choose sequestration over DAS if their debt level fails to meet PTD qualifying criteria. The return to creditors from such bankruptcies would be nil.

5.24 The individuals that this change might affect are often vulnerable, and although they may have ‘low’ debt levels, this usually reflects a low disposable income. They will often be reliant on social security benefits, to enhance income from employment. We believe that these individuals should have access to PTDs as well as DAS and sequestration. In our opinion, their right to access and to have a choice of debt solution is more important than creditors’ desired alteration to the legislation that governs the qualifying criteria for a PTD.

5.25 Most importantly, this change, if implemented, will unfairly impact Scottish residents that have been (and will be) affected by the economic fallout of the Coronavirus pandemic. Worryingly, we can now add to this group those that will be affected by the reduction in Universal Credits, the upcoming increase to National Insurance, rising inflation, increased cost of living, the increased cost of gas and electricity and an expected increase in interest rates. Cumulatively, these changes will mean that the number of people seeking a debt solution in Scotland is likely to increase in 2022 and beyond, we should not be making it harder for these individuals to access one of our three statutory debt solutions.

## The case for change - increasing the minimum debt level in PTDs and/or increasing the protection criteria period to 60 months

5.26 The arguments put forward for change, including the increase in minimum debt, further restrictions on protection criteria or a combination of both were broadly articulated by smaller, community–based creditors. The following range of issues encapsulate these arguments:

* the increase would be expected primarily to increase the return to creditors in cases with low levels of debt
* previous legislative changes have not resulted in increased dividends to creditors despite being posited as part of the reason for change
* PTDs should be used to help those with unsustainable debts. A PTD should not be an appropriate solution for those who can repay their debts in a reasonable timescale
* fees and outlays charged in PTDs in cases with debts of circa £5,000 result in unacceptably low levels of dividends to creditors
* a majority of respondents to the previous consultation and the Committee were in favour of an increase. Far from being irrelevant, given the expected increase in the numbers of people seeking debt help post the Coronavirus pandemic, the views expressed in the previous consultation are more relevant than ever to help ensure that the process is fit for purpose, and supports those who can pay their debts to do so while being fair to all stakeholders
* table 4 demonstrates that 1,427 PTDs were signed between 2018 and 2021 where the debts could have been repaid in 60 months or less. Therefore, if the average administration expenses including outlays were around £5,000, for example, then this equates to approximately £7.1m being charged in fees/outlays instead of being repaid to creditors if those individuals did not opt for another debt solution [[1]](#footnote-1)
* perception is that keeping the minimum debt level at £5,000 is about revenue protection for IPs.
* those repaying relatively low levels of debt through DAS will likely increase.
* many finance products offer repayment terms of 60 months or more. Trust Deeds regularly exceed the original 48 month term. It is therefore reasonable and fair that anyone who can actually repay their debts, regardless of amount, in 60 months or less, is given the opportunity to do so
* to be equal stakeholders and to ensure fairness, debtor choice has to be balanced with the best interests of creditors
* repaying your debts, where you can reasonably afford to do so, is the right thing to do, it should be encouraged and is a positive step towards financial rehabilitation

## Recommendation

* **Recommendation 2** - In the absence of consensus on this issue, the working group invites the Scottish Ministers to further consider the issues highlighted in its discussion, along with the recent statistical information that has been provided. Scottish Ministers are asked to consider what action, if any, is appropriate on the issue of raising minimum debt, imposing further restrictions on the parameters for trust deeds to gain protected status based on contributions and the time required to pay all debts. Some of the options for consideration and further development follow:
* remove the minimum debt level to entry all together
* raise the minimum debt level to a higher level (to be agreed) and retain the four year period of contribution
* raise the minimum debt level to a higher level (to be agreed), retain the four year period of contribution and add a qualifying criterion that if the debt can be repaid in full (assuming a freezing of interest and charges) within either 54 or 60 months, then the debtor does not qualify for a PTD
* remove the minimum debt level to entry and replace it with the sole qualifying criteria that if the individual’s debt can be repaid in full (assuming a freezing of interest and charges) within either 54 or 60 months, then the debtor does not qualify for a PTD.
* **Recommendation 3** - The members unanimously agreed that any consideration to the creation of an additional debt solution would be better placed under Stage 3 of the Wider Review of Scotland’s debt solutions. Stage 3 will involve those taking part looking at the longer term strategic review of debt solutions to assess if they meet the needs of the modern economy which could include considering alternatives to the solutions already available. The issue was not discussed further by the group at this stage of the review.

# 6. Prescribed rate of interest

## Introduction

6.1 The group discussed the recommendation from the Committee PTD Inquiry concerning the current 8% prescribed rate of interest (recommendation number 14 in table at paragraph 3 above).

*“Both the consequence of a death in a Protected Trust Deed and the consequences of early settlement are impacted by the statutory interest rate. The Committee believes that the approach of using the longstanding 8% statutory interest level is not appropriate for insolvency cases as it is too high. This should be reviewed in relation to insolvency.”*

## Background

6.2 The prevailing and long-standing low Bank of England base interest rate had prompted discussion and comment as to whether the existing prescribed interest rate in insolvency is appropriate.

6.3 In late 2019, AiB carried out a consultation reviewing the changes introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”). A report was published in 2020 summarising responses to the consultation.

6.4 Respondents were asked whether they considered that the current prescribed 8% rate of interest for dividends in bankruptcy was appropriate.

6.5 Approximately 75% of respondents answered this question, and of those, 77% did not consider the 8% prescribed rate of interest to be appropriate.

6.6 Respondents who considered 8% as inappropriate were asked what alternative rate should apply. Of those that offered their view, 42% believed that the Bank of England rate +2% to be the most appropriate interest rate. 37% of respondents believed the Bank of England rate alone was the most appropriate prescribed interest rate for insolvency procedures.

6.7 Some respondents believed that in the current economic climate it was more appropriate to link the bankruptcy rate to the Bank of England rate as it was responsive to changing circumstances and market conditions. It was suggested that the rate should be set above the Bank of England rate as there should be some level of reward or compensation for a creditor having to wait for repayment.

## Discussions

6.8 There was consensus amongst the group that the currently prescribed 8% interest rate is too high. The group was aware that this issue was also being considered in some detail by group 3. Group 2 agreed that a prescribed rate linked to the base rate would appear to be the simplest and fairest solution.

6.9 In practice, the prescribed interest is paid in only a small number of bankruptcy cases and mostly in creditor petition sequestrations. As the application of interest, and the circumstances when it would apply, was more common in bankruptcy than PTDs, the group considered that group 3 should lead on this issue.

## Recommendation

* **Recommendation 4** - Group 2 deferred to group 3’s recommendations regarding statutory interest. However, the group agreed that the current 8% interest rate is too high. The general consensus of the group is that a model linked to the bank base rate would appear to be the simplest solution but consideration should also be given to whether a cap would be required.
* **Recommendation 5** - At the time of writing, wider economic pressures mean that interest rates may increase, and the discussion surrounding the statutory rate of interest may need to be revisited to take account of different background circumstances.

# 7. Improving information and understanding

## Introduction

7.1 The group discussed the Committee recommendations concerning debtor choice and the introduction of an information leaflet for debtors prior to signing a PTD (recommendations 7 and 9 in the table in paragraph 3 above).

*“Witnesses highlighted the importance of debtor choice and, if the debtor is to have choice, they must be fully informed of all of their options. It is also vital that the debtor understands these options. It is far from clear that this is happening in many cases.”*

*“The Committee notes evidence from the Inverclyde focus group, where participants suggested that information about the benefits and risks of different statutory debt solutions should be given to everyone thinking about entering a Protected Trust Deed. The Committee agrees that a Scottish Government information leaflet which is presented in easily accessible language (in both print and digital formats) and signposts debtors to independent money advisers would be beneficial. The Committee recommends that trustees are required to issue this information leaflet to debtors before signing a Protected Trust Deed. The Committee also recommends that a cooling off period is put in place between receiving the leaflet and signing a Protected Trust Deed, to give debtors time to digest its contents. This would serve a different purpose from the current Debt Advice and Information Package.”*

## Background

7.2 During the Committee inquiry, some stakeholders raised concerns about the level of debtor choice in the process; whether debtors were fully informed of all options available to them individually and the extent to which the options and advice had been understood by a person before entering into a trust deed.

7.3 The Inverclyde focus group suggested that there should be a Scottish Government leaflet issued to everyone considering a statutory debt solution. This would highlight the key benefits and risks associated with each solution using easily accessible language. The publication should be widely available, for example in GP surgeries and public libraries. The leaflet should be short, include graphics and signpost consumers to independent money advisers for follow-up questions and information. Trustees would be required to issue this leaflet to debtors before signing a PTD as it was felt that the Scottish Government's Debt Advice and Information Package did not adequately cover these matters.

## Discussions

7.4 The group discussed the issue of debtor choice and how to ensure that a debtor has the required information to enable an informed decision on the best solution for their individual circumstances. The group acknowledge the difficulty in providing the right level of information for each individual in a format that is easy to understand. It was noted that it is difficult to measure a debtor’s understanding and as a consequence it was essential that the information provided is clear and to the point.

7.5 The group discussed the merits of introducing a PTD information leaflet. An individual usually receives a lot of information from the trustee’s firm and or debt referrers, and there was some concern that adding documentation to the pre-appointment process risked disengagement, which would detract from the intended purpose of clarification. There was a consensus that the information leaflet should be concise, written in plain English and kept to a maximum of two pages.

7.6 The group agreed that a summary of terms or glossary would be helpful as well as key headlines with frequently asked questions, for example, how a PTD would affect an individual’s credit rating and what would happen to their home.

7.7 The group discussed whether PTD fee information should be included within the leaflet. As this leaflet would be a precursor to a PTD, consumer representatives were of the view that information on PTD fees should be included at this early stage along with information on the implications of an unsuccessful trust deed as this will ensure that the client has information on all eventualities from the outset.

7.8 However, after full discussion the majority of the group did not consider it appropriate to include detailed fee information, since any resultant fee was based on an individual’s circumstances, specifically the level of their contributions and any assets they owned.

7.9 Fee information is included within the trust deed documentation, which is sent to creditors and in many firms, is also included in a firm-specific letter of engagement, before any trust deed is signed. This is a requirement of SIP 3.3, which is currently under review.

7.10 The group considered an example of a pre-contract agreement provided to an applicant in advance of the completion of a personal loan and whether something similar, incorporating fee information, could be used in PTDs. IP members of the group noted that such documentation already forms part of a trust deed proposal and members acknowledged the risk of duplication and information overload but recognised that a condensed version could promote transparency and better understanding.

7.11 The group discussed whether a cooling off period might provide additional protection for debtors granting a trust deed. Although there is no such statutory requirement, SIP 3.3 requires that the debtor is given adequate time to think before granting a trust deed. Some members felt that the current wording of SIP 3.3 could be strengthened.

7.12 Although introducing a formal cooling off period would bring trust deeds into line with other complex financial products, the group acknowledged the difficulties in implementing this provision in trust law (a trust deed takes effect on signing) and for this reason, any recommendation could not be made within Stage 2. Ensuring the client receives the relevant information at the outset of the process in order to make an informed decision on the appropriate solution was the critical issue.

## Recommendation

* **Recommendation 6** - The group agrees that it is critically important a debtor receives sufficient information in order to make an informed choice on the option which best suits their individual circumstances.
* **Recommendation 7** - Members agree that the draft PTD information leaflet is a useful starting point to improve transparency. Further work is required in order to future proof the information made available to consumers and the channels of its distribution. As an example, there could be a move towards using technology and social media to better reach people who need help. The group recommend that the PTD information leaflet should be published on the AiB website and made freely available. It would also be helpful if a reference to the PTD information leaflet is included within the AiB’s guidance notes. An example PTD information leaflet is included at Annex A.
* **Recommendation 8** - It was suggested that AiB on behalf of Scottish Government could do more to advertise and raise awareness of all statutory debt solutions using a number of communication channels.

# 8. Free independent advice prior to signing a trust deed

## Introduction

8.1 The group considered the linked recommendations of the Committee concerning the provision of free, independent advice for individuals prior to them granting a trust deed and the associated resourcing issues that would be created by reforms of this nature (recommendations numbers 6 and 8 in the table in paragraph 3 above). The recommendations are set out below:

*“The Committee does not doubt that insolvency practitioners follow the statements of insolvency practice and that Protected Trust Deed paperwork includes the necessary information for people in debt to make informed choices. However, the Committee is also convinced by the argument that the offering of free independent money advice is of benefit in bankruptcy and Debt Arrangement Scheme cases and, if applied to Protected Trust Deed cases, would go some way towards addressing the concerns of witnesses during this inquiry”*

*“The Committee notes the significant increase in funding that would be required if all people experiencing problem debt were to seek independent free money advice before entering any of the three statutory debt solutions. However, it asks the Scottish Government to consider how access to free sector money advisers could be encouraged and built into the process before a debtor signs a Protected Trust Deed. The Committee recommends that different funding options should be explored to enhance the capacity of the free money advice sector, including the use of a levy on money paid through statutory debt options”*

## Background

8.2 Evidence given to the Committee Inquiry and further stakeholder feedback raised concerns about the extent to which some individuals with problem debt are being “mis-sold” a PTD in favour of an alternative solution better suited to their needs and the interests of the creditors involved.

8.3 Examples were given of PTDs failing because they were neither viable nor sustainable, having no sound financial basis on which to proceed at the time of application.

8.4 Questions were raised as to whether individuals received comprehensive advice on all other suitable options before entering a trust deed, or whether some advice providers (such as lead generator/debt packager companies) had promoted the option of PTDs due to the financial incentives involved. The FCA Consultation on Debt Packagers is however intended to address this malpractice.

8.5 Statute requires a debtor to receive money advice before they enter any statutory debt solution. Free sector money advisers can provide this for bankruptcy generally and DAS. However, it is usually an IP (or someone who works for them) who provides this advice prior to the granting of a trust deed or a more complicated sequestration.

8.6 Scotland’s free money advice sector has called for their members to offer advice in advance of signing a trust deed. Given the sector’s role in bankruptcy and DAS, there have been calls for a similar and consistent approach in relation to PTDs.

8.7 Other stakeholders have called into question the extent of this perceived problem, highlighting the lack of evidence to suggest that large numbers of people are being directed to wholly inappropriate solutions.

8.8 There is unlikely to be adequate resource in the free advice sector to deal with demand for advice if it became a pre-requisite in advance of all statutory solutions. Evidence was given to the Committee Inquiry that there was already unmet demand for debt advice, with figures showing only one fifth of those in problem debt seeking help from the free money advice sector.

8.9 Additional resource would therefore be required in the free money advice sector if it was obliged to offer advice to every individual seeking to enter a statutory debt solution. A proportion of free money advice sector funding is provided by local authorities and several witnesses to the inquiry highlighted concerns about funding cuts which have resulted in longer waiting times for appointments and more limited services.

8.10 It is widely expected that demand for debt advice will grow in the aftermath of the Coronavirus pandemic and this may place greater strain on the free advice sector. In this context, stipulating free sector adviser involvement in the PTD process may exacerbate these issues and create additional delay for those seeking urgent help with financial difficulty and problem debt.

## Discussions

8.11 The group’s view is that it is not currently possible to have pre-trust deed advice provided exclusively by the free money advice sector. There is a lack of available resource to meet potential demand.

8.12 The working group recognised that the free advice sector faces significant pressure and the demand is likely to increase as the full economic consequences of the Coronavirus pandemic are felt amongst consumers.

8.13 The future resourcing of the sector is an important consideration for Scottish Government and the group considers that this should be a clear priority linked to the delivery of the Debt Advice Route Map. This should include exploring alternative models to resource the sector; ensure that the capacity exists to meet future demand and that the advice needs of those facing issues of problem debt are met.

8.14 The group considers that these funding issues are beyond the scope of the wider review of statutory debt solutions.

8.15 In the context of money advice, the group also discussed the recent reforms to DAS. Early evidence on their operation shows that the majority of DAS applications are now instigated through private sector organisations. This indicates that a mandatory requirement for free sector advice prior to the granting of a trust deed would create inconsistency with DAS. It was also provided as a counter to the perception that some IP firms only promote PTDs as a preferred solution.

8.16 Members discussed the practicalities of signposting debtors from the money advice sector to an IP. There were concerns that building in this additional step would lengthen the process resulting in severe delays and may not be practical. There were also questions around how an IP would be able to evidence that someone had received this advice and that this would further complicate an already complex area.

8.17 Some members suggested that the Committee report and recommendations implied that IPs are providing incorrect advice. There is a stringent process in place when someone enters a trust deed, including a significant level of information gathering and the requirement to meet statutory and regulatory obligations. The group agreed that the main priority was to ensure that advice was provided by appropriately skilled people, irrespective of whether they worked in the free, charitable or fee charging advice sector.

## Recommendation

* **Recommendation 9** - The group believes that the provision of high quality advice by appropriately skilled people in advance of entering any debt solution is of critical importance. This applies irrespective of whether this is provided through the free, charity or fee charging advice sector. Signposting by the free money advice sector in all cases is unlikely to be feasible.

The group consensus is that the money advice sector is likely to face resourcing pressure as a consequence of the Coronavirus pandemic - this could create issues in matching supply to demand. In order to improve access to advice, funding is required from the Scottish Government to create capacity and maintain experience and skills in the sector. It is important that this is one of the clear future priorities for the Scottish Government and work should include exploring alternative models to resource the sector. The group considers that these funding issues are beyond the scope of the wider review of statutory debt solutions.

# 9. Implications of debtor’s death during a protected trust deed

## Introduction

9.1 The group considered the recommendation of the Committee’s Inquiry to consider if PTD arrangements strike the appropriate balance between creditors and family members when death occurs during a PTD (Recommendation number 13 in the table at paragraph 3 above).

*“Committee members were concerned about the impact on family members of death during a Protected Trust Deed. On the one hand, it seems unfair that creditors who have agreed to be repaid via a Protected Trust Deed should get a windfall as a result of a death. On the other, it is recognised that the current legal framework requires debts to be settled before beneficiaries are entitled to receive anything from a deceased person’s estate. The Committee recommends that the Scottish Government looks at whether Protected Trust Deed arrangements strike the appropriate balance in this area as part of its general debt review.”*

## Background

9.2 The agreement between the debtor and creditor which forms the basis of the PTD does not end on the death of the debtor. This means that the estate of the deceased debtor remains liable for payment of all their debts in full (if sufficient estate is available). In addition to the original sum included in the PTD, creditors are entitled to interest at the prescribed rate, where funds are available to meet the debts in full (per Section 129). IPs would also be entitled to charge the variable asset realisation fee for work done in realising any assets. If the deceased debtor owned a home, this will often need to be sold to pay the debt. Any life assurance will often be paid to the trustee as an asset of the debtor’s estate.

9.3 The sum of debt, interest and fees for realising assets will be deduced from the estate before any inheritance will be paid out to beneficiaries, assuming that any surplus exists. This mirrors the order of distribution of a deceased individual’s estate who is not bankrupt. This could mean the estate has to pay out more than the value of the person’s original debt, reducing the amount of funds available to pay inheritance but equally any debtor leaving behind an insolvent estate still benefits from debt relief and the beneficiaries do not inherit the debt. A specific case was highlighted and discussed during the Committee Inquiry.

## Discussions

9.4 The group discussed the current process that applies where a debtor dies during insolvency. If a debtor dies in the course of their bankruptcy or PTD, the trustee remains in office. There is no change in statutory position or statutory requirement for the trustee to deal with assets of the estate. The trustee is still required to deal with claims of creditors ahead of recognising any rights and entitlements of beneficiaries. The trustee also has the right to recover fees for their work, as they would if the debtor were alive, which includes the agreed percentage fee in the realisation of any asset.

9.5 Members also looked at aspects of succession and partnership law where the principle that creditors get paid ahead of beneficiaries or partners is well established. In all cases, the law recognises that debt is a responsibility and that wherever possible, creditors should be repaid their obligation ahead of any individual benefitting in a personal capacity i.e. as a beneficiary to an estate or a partner sharing profits in a partnership.

9.6 In a non-bankrupt estate the executor is first required to obtain Confirmation. This is the process that vests the deceased’s estate in the executor to allow them to ingather and distribute the estate. Once they have ingathered the property/assets, the executor’s next duty is to pay off any debt owed by the deceased. The liability to the creditors is limited to the value of the estate at the date of death. Once the debts have been settled, only then is the executor entitled to make over the remainder of the estate to the beneficiaries entitled to it according to the terms of the Will or law of intestacy (if no Will). The same duty to settle debts ahead of recognising any entitlement of beneficiaries to the estate applies to the trustee if the debtor dies in the course of sequestration or a PTD.

9.7 Looking at these areas of bankruptcy, succession and partnership legislation, the group agreed that the repayment of debt to creditors ahead of beneficiaries from a deceased estate is well established in different areas of the law. Taking this into consideration, members unanimously agreed that no changes are required to this existing principle in the PTD process.

9.8 Members from IP organisations confirmed that their organisations would only take fees that would equate to full cost recover if they had to realise an asset where a debtor died while in a PTD. They also exampled cases where debtors have died and there have been no assets available to pay off the debts in the PTD. In these situations permission has been sought from AiB to close the case early rather than wait for the full four year term. It was suggested that AiB’s notes for guidance should be updated to say that where there are no assets to realise in this circumstance the trustee should seek permission from AiB to close the case early.

9.9 The group agreed that wording could be added to section 15 of the Scottish Government publication, “What to do after a death in Scotland” to explain about the process where a debtor dies while in a PTD or bankruptcy. This wording should make it clear that an executor of an estate should check the Register of Insolvencies and DAS Register with both the details of the deceased and the beneficiaries to establish if any party is subject to insolvency or a DPP. This check should be done before any money is paid out from the estate.

9.10 The group suggested that incorporating this process into legislation should be considered in the later stages of the overall review.

9.11 This would also be conveyed to the Law Society of Scotland to see if it would be possible to have an article or journal covering this request published in a future issue. The article was written by members and published by the Law Society of Scotland in October 2021

## Recommendation

* **Recommendation 10** - No change to the existing process required but AiB should liaise with the area responsible for the Scottish Government “What to do after a death in Scotland” publication with a view to making it compulsory for an executor to check the Register of Insolvencies and the DAS Register before distributing any funds.

# 10. AiB protected trust deed audit activity

## Introduction

10.1 The group discussed the recommendation from the Committee PTD Inquiry requesting that AiB increase self-initiated audits to monitor and discourage potential poor practice, and publish any trends found (recommendation number 10 in the table in paragraph 3 above).

*“The Committee understands that creditors and debtors can refer cases to the Accountant in Bankruptcy for audit where there are concerns about the fees charged. However, there is a cost attached to this, which may deter action. The Committee therefore recommends that the Accountant in Bankruptcy increases the number of self-initiated audits it carries out in order to monitor and discourage potential poor practice. The Accountant in Bankruptcy should also publish information about any trends it identifies so that insolvency practitioners, creditors and debtors can make themselves aware of any concerns*.”

## Background

10.2 The implementation of the 2013 Regulations (amalgamated into the 2016 Act) introduced changes to the trustee remuneration process. Previously, trustees charged on a “time and line basis” and this was replaced by a fixed administration fee supplemented by a percentage of realisations (sale of assets and debtor contributions).

10.3 These reforms were introduced to provide greater transparency to creditors and debtors and provide more certainty to creditors in considering the initial fixed fee and percentage charged for realisations when agreeing to the terms of the trust deed during the protection process.

10.4 In addition to the initial fixed fee trustees can recoup “outlays”. These can be sums paid to third parties for services to the trustee to cover things like a house valuation, or fees for legal services (category one disbursements). These can also include costs related to the PTD appointment incurred by the trustee such as printing, postage and business mileage (category two disbursements). The trustee has to seek permission from creditors to claim any category two disbursements in addition to their fixed fee.

10.5 There have been concerns raised over the costs involved in PTDs – particularly in relation to the inclusion of office overheads as outlays. During the Committee Inquiry some creditors questioned how these outlays were calculated and presented examples of cases where there had been an increase in outlays during the term of the PTD.

10.6 Statistics provided by AiB to the Committee Inquiry highlighted a general increase in outlays across cases evaluated – comparing the anticipated costs declared as estimated outlays in the Form 3 to the final outlays incurred and declared in the subsequent Form 4 (depending on the age of the case). However, the Committeenoted AiB’s observation that there was no hard evidence that the trends highlighted represented profiteering by the firms involved.

10.7 AiB can initiate an audit of fees on a case if deemed appropriate or on request of the trustee, debtor or creditor involved in the PTD. For PTDs under the pre 2013 Regulations, AiB can reduce the time charged by the trustee where there is insufficient supporting evidence. However for PTDs under the existing legislation, where the initial fees and percentage charge for realisation are set at the outset, there is limited scope for the trustee’s fixed fee to be reduced through the audit process. In these cases AiB can reduce or disallow outlays incurred throughout the administration of the PTD where deemed appropriate.

10.8 If the audit is requested by the trustee, creditor or debtor in a PTD, AiB will charge an audit fee of 5% of the determined fee. If the audit is initiated by AiB no fee is incurred. This fee is allowable as a cost of the PTD process.

## Discussions

10.9 It was highlighted that outlays charged to the case, particularly category one disbursements, were costs already incurred by the trustee during the administration of the trust deed.

10.10 Members discussed this matter and there was consensus that this recommendation is a matter for AiB to consider and address. The group agreed that no further discussion was needed on these points.

## Recommendation

* **Recommendation 11** - The Committee recommendation is that AiB considers and addresses in operational practice and reports separately to the Parliament.

# 11. Debtor discharge and refusal of discharge

## Introduction

11.1 The group considered whether an offer of composition provision should be introduced in PTDs. The concept of composition is that it allows debtors to bring their trust deed to an early conclusion on terms that are agreeable to their creditors. Additionally members looked at the discharge and refusal of discharge processes to identify where improvements could be made for the benefit of all parties involved and suitable protections introduced.

## Background

### Offer of Composition in Bankruptcy

11.2 Historically a debtor was allowed to make an offer of composition to their creditors that would allow either early discharge (important when automatic discharge was on the third anniversary) or to protect certain assets (such as the family home) from the sequestration process.

11.3 The use of composition as an option available to debtors has decreased over the years, predominantly in light of the debtor’s automatic discharge being granted after one year. For example, there were fewer than five composition applications made in bankruptcy between 2008 and 2012.

11.4 The composition process was reviewed and abolished by the 2014 Act, in conjunction with the abolition of automatic discharge of the debtor 12 months following the award of sequestration. The policy rationale was that only those debtors who met the criteria for recall on the grounds of payment in full and those subject to Minimal Assets Process sequestrations should be eligible for an early or automatic discharge. With its abolition, the opportunity to use an offer of composition to settle with creditors was lost.

11.5 The policy view at that time was that there should only be two routes out of bankruptcy: recall with payment in full or active discharge with associated debt relief.

11.6 It was considered that composition (involving partial repayment of no less than 25 pence in the pound) was no longer required and, accordingly, the debtor’s right to make an offer of composition was removed from legislation.

### Composition in PTDs and debtor discharge

11.7 Section 184 and 186 of the 2016 Act set out the process for obtaining the debtor’s and trustee’s discharge from a PTD. Neither section seems to allow for the early discharge of either party prior to the completion of the 48 month contribution period (aside from where all debts are met in full).

11.8 There is no provision in the current PTD legislative process to allow an offer of composition to be made to creditors in a PTD. It is possible under the principles of trust law, if the trust deed contains a clause to allow it to be brought to an end in return for part payment of the debt, then it will be competent for an offer of composition to be made and agreed with creditors. Such a provision is not common across trust deeds used in the industry.

11.9 Provisions stipulating a payment period of 48 months were introduced through the 2013 Regulations (now consolidated in the 2016 Act). A fixed four year period of acquirenda was also introduced, and any trust deed that did not contain that provision, could not be presented for protection. As a consequence of that 48 month contribution period, mirrored in the four year period of acquirenda, it would appear that a debtor is unable to receive their discharge until the expiry of the period of 48 months from the date the trust deed is granted at a minimum. The only mechanism allowing for a reduced period involves paying creditors in full, including interest.

11.10 There has been some discussion, including at the Committee evidence sessions, on whether a permanent change in the debtor’s circumstances through no fault of their own, for example, serious illness, should give rise to early discharge from the PTD and the debts involved.

### Refusal of discharge of the debtor

11.11 Section 184(8) of the 2016 Act deals with the trustee’s refusal to apply for the discharge of the debtor. Refusal of discharge of a debtor in the PTD process will normally be due to non-cooperation of the debtor, and their failure to meet the terms and obligations of their trust deed. Interpretation of this area of the legislation indicates that a trustee may refuse to apply to the AiB for discharge of the debtor, but that refusal must either be following a request for discharge by the debtor, or as soon as reasonably practicable after the end of the repayment period (i.e. 48 months or the alternative period agreed).

11.12 Section 184(8) of the 2016 Act provides that the trustee must notify the debtor in writing of the refusal of discharge and while doing so inform them of their right to apply to the Sheriff for a direction (under Section 189 (1) of that Act). Section 188(4) of the 2016 Act also contains a further option for the debtor to appeal to the Sheriff against the refusal by the trustee to apply for the debtor’s discharge.

11.13 After the discharge of a debtor, or the refusal to discharge a debtor, the trustee will seek their own discharge from the creditors. Section 186 of the 2016 Act refers to the trustee having made a final distribution (which may be a nil distribution).

## Discussions

### Offer of Composition and discharge of a debtor

11.14 The group’s consensus was that the previous composition process outlined in Schedule 4 of the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”) (pre revisions in 2008) should be introduced.

11.15 Despite its low numbers latterly, this provision had been very effective in bankruptcy and should be introduced (and modified as required) to the PTD process.

11.16 The group agreed that AiB should be involved in the process. The group believe that the previous 100% creditor consent provision may have been a barrier to composition and, consequently, a fair and reasonable test should be considered where not all creditors agree to an offer of composition.

### Benefits of Composition

* Debtors do not have to wait until the 4th anniversary of their Trust Deed to receive their discharge.
* Creditors are paid the expected or enhanced dividend, at an earlier date.
* Key assets, for example the family home, could be reconveyed to the debtor on an offer of composition being agreed for equivalent or enhanced terms over a shorter period.

### Disadvantages/Risks of Composition

* Creditors potentially forgo their right to future dividends from income contributions (possible if the debtor is unemployed but then returns to paid employment before the end of the 48 month period) and acquirenda, for example, inheritance.

11.17 In discussion, it became clear that an Offer of Composition would be useful to allow an early discharge of the debtor on broadly equivalent terms but would not address a scenario where a debtor whose circumstances had changed irrevocably, and who would not be able to complete the terms and obligations of the trust deed through no fault of their own.

### Early debtor discharge before the end of the repayment period

11.18 The group discussed the introduction of a new provision to allow a debtor to be discharged from their PTD before the end of the repayment period in circumstances where there was a permanent change to the debtor’s circumstances which meant they could no longer make contributions to the PTD through no fault of their own – examples of serious illness or injury meaning the individual could no longer work were given.

11.19 The group agreed that this new process would be a sensible approach for all parties involved in a PTD. Members agreed that the process should include the trustee’s obligation to seek creditor and AiB consent to approve early discharge. In each case the trustee would have to seek approval from the creditors in the first instance. If creditors objected then the case should be referred to the AiB for review.

11.20 Once agreed by the relevant parties, the trustee would then be able to seek their own discharge in usual terms per Section 185 of the 2016 Act.

### Refusal of the debtor discharge

11.21 The group agreed that any perceived time limitations on a trustee in applying to refuse a debtor discharge from a PTD should be removed from legislation. It was agreed that the majority of cases where discharge was refused was due to non-compliance of the debtor and sometimes a breakdown in communication between the debtor and trustee. Consensus among members was that in such cases requesting the debtor to apply for discharge, specifically to allow the trustee to refuse discharge would be difficult and it would be unfair and non-cost effective for the creditors and the trustee to have to wait until the expiry of the repayment period to begin the process.

11.22 It was agreed that the process (without the time limitation) should remain but could codify in law the stipulations currently set out in the PTD Protocol for trustees refusing to grant a debtor’s discharge. Once the refusal of discharge had been agreed the trustee would then be able to seek their own discharge.

11.23 The members discussed the methods of recourse available to the debtor to challenge the fact that their discharge was refused. Some members reported that neither the appeal nor the direction to sheriff process had been used to their knowledge. It was suggested by members that this may be because of the individual’s apprehension of taking their case to a sheriff and or the associated cost of doing so. It was suggested that this role could be transferred to AiB. However, this would require a tightly controlled process with clear rights of review/appeal available to impacted parties. Members agreed that this is something that should be considered.

## Recommendations

### Offer of Composition

* **Recommendation 12** - The group recommends that the offer of composition process as previously outlined within Schedule 4 of the 1985 Act (pre 2008 changes) is introduced to PTDs, with consideration given to current legislative processes. The group also recommend that AiB is involved in the composition process with a fair and reasonable test to be considered if all creditors do not agree.

### Early discharge

* **Recommendation 13** - The group recommends the introduction of a new provision to allow debtors who can no longer make contributions to their PTD, to be discharged from their PTD before the end of the acquirenda and repayment period. This new process should only be for specific situations where there is a permanent change to the debtor’s circumstances meaning they can no longer make contributions to the PTD through no fault of their own. In recommending early discharge the trustee must first seek approval from creditors and if creditors objected, then the case should be referred to the AiB for review. Once agreed by parties the trustee would then be able to seek their own discharge.

### Refusal of discharge

* **Recommendation 14** - The group recommends the removal from legislation of any time limitation for a trustee refusing to apply for a debtor’s discharge. The process should allow the trustee to initiate the refusal of discharge at any time without the request first being initiated by the debtor. Once the refusal for discharge had been agreed the trustee will then be able to seek their own discharge via the normal route.
* **Recommendation 15** - It was also agreed that a debtor should always have recourse to challenge the decision to refuse discharge and it could be that this role move to AiB. Consumer representatives also consider it important that the debtor is informed of the consequences and that the right to refuse discharge is explained at the outset of the PTD. Where the refusal has been sought, the debtor should be simultaneously signposted to advice agencies and creditors to provide a reasonable grace period while the debtor seeks advice, remedies the position or initiates the appeals process with AiB. These are points that should be considered in future changes to the legislation.

# 12. Group membership

12.1 With thanks to the members of the group who provided their valuable time and expertise and led this work.

* Andrew Maak, J3 Debt
* Anne Hastie, Law Society Scotland
* Barry Stewart, 180 Advisory Solutions (left group on 20 July)
* Bhavna Thanki, Equifax
* David Ross, National Credit Union Forum
* Eileen Maclean, IPA
* Ewan Watson, IC Loans
* Frances McCann, Scot West Credit Union
* Graeme Macleod, Carrington Dean
* Jeanette Hoffie, HMRC
* Paul McDougall, Wylie & Bisset
* Abbey Fleming, MAS
* Thomas Fox, Harper McDermott

# Annex A – Draft protected trust deed information leaflet

**Are you thinking about entering a Protected Trust Deed?**

A protected trust deed (“PTD”) is a binding arrangement with your creditors (the people you owe money to) whereby your assets (things you own) are transferred to a person called a trustee who can sell them to pay your creditors. You will normally be required to make monthly contributions from your income. Your trustee will be a qualified insolvency practitioner and will communicate with your creditors on your behalf.

**Important things to be aware of­­­­­­­­­­­­­**

* **Affordable monthly payments** - under a PTD repayments are made to your trustee to distribute to your creditors over a period of four years (this can vary). The repayments are made up of funds from any sale of certain things you own along with monthly payments from your income (your contribution).
* **Creditors won’t chase you for payment** - creditors are prevented from taking action to recover debts included in your PTD or taking court action to make you bankrupt.
* **Most debts written off at** **the end of your PTD** – if you have fulfilled your obligations, any debt left over after your repayments will be written off. This could mean that you may not repay 100% of the debt owed to your creditors however you cannot be pursued for money owed at the date the trust deed was granted.
* **You may be able to keep your car** - if it is valued below a certain level and you have a reasonable need for it, for example to travel to work.
* **If** **your circumstances change** - and you feel you are unable to meet the agreed level of contribution you can ask your trustee to reassess how much you have to pay.
* **A PTD will affect your credit score** -credit reference agencies will record details of your PTD on your credit file which may make it difficult to get credit in the future – including a new mortgage.
* **Your PTD will be recorded in the Register of Insolvencies (“ROI”)** - this is a public record which anyone can access. You can access the ROI here: [www.aib.gov.uk/debt/register-insolvencies](http://www.aib.gov.uk/debt/register-insolvencies)
* **You must co-operate and meet the requirements of the PTD** -if you fail to co-operate with your trustee, they may not discharge you from your debts. This means at the end of your PTD you will still owe your creditors money and action can be taken to recover the money you owe. Your trustee can also ask the court to make you bankrupt.
* **Things that you own are transferred to your trustee including any new assets** - there are exceptions for certain essential items.Any new assets you receive within four years from the date you sign your trust deed will be transferred to your trustee (including any inheritance or wind-fall such as a lottery win). You **must** tell your trustee if you receive any new assets**.**

**Important Questions­­­­­­­­­­­­­**

**How much will I pay?**

Your trustee will work out how much you have to pay by making an assessment of your income and expenditure. The money you have left over each month after all of your expenditure is accounted for will be paid to your trustee as your contribution.

**What happens if I don’t pay?**

If you don’t pay your contribution your trustee can ask your employer to deduct it from your wages or extend the period that you have to pay contributions. If you don’t co-operate with your trustee they may not discharge you from your debts. They can also ask the court to make you bankrupt.

**Will I pay a fee for my PTD?**

Yes, your trustee will charge a fee for the work they do but you will not have to pay these costs upfront. The money gathered in by your trustee during your PTD is likely to be used to pay their fees first, before any money is available to repay your debts.

**Can I cancel my PTD?**

No. A PTD is a binding agreement. If you fail to comply with your obligations your trustee can apply to the court for your bankruptcy.

**Can I pay off my PTD early?**

If you receive new assets during your PTD that could be used to meet the administration costs and pay your creditors in full (e.g. an inheritance or wind-fall such as a lottery win) you may be able to pay off your PTD early.

**Will a PTD affect my employment?**

Some employers do not allow people who have signed a trust deed to work for them. This should be clarified with your employer.

**What will happen to my home under my PTD?**

If you own your home and its value is higher than the outstanding mortgage, your trustee may be required to sell it in order to meet the payment of your debts. You can request that your home is excluded from your PTD if your creditors agree (including your mortgage lender). You should speak to your trustee to explore options that avoid selling your home – for example, a family member may be able to buy out your interest with a lump sum or you may be able to make additional monthly payments in your PTD.

**What happens if I die during a PTD?**

Your estate (all of the funds available following death) will be liable to pay all of your debts in full plus interest. This means that your assets will be sold to pay your creditors along with any fees charged by your trustee in administering your PTD. These costs would need to be met before your family are entitled to receive any inheritance.

**Before you sign a trust deed you should seek advice about the consequences of signing and any alternative debt solutions available to you. You can get free impartial advice from Citizens Advice Scotland, Money Advice Scotland or local authority money advisers. You can find out more information about protected trust deeds on AiB’s website at** [**www.aib.gov.uk/protected-trust-deed**](www.aib.gov.uk/protected-trust-deed)

1. If an individual chose to enter DAS then creditors would incur a 22% fee on the total debt owed. [↑](#footnote-ref-1)